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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
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11 LARRY TATE, ) Case No. CV 09-9237-DDP(RC)  
12 )  
13 Petitioner, )  
14 vs. )  
15 JAMES A. YATES, ) OPINION AND ORDER ON A  
16 ) PETITION FOR HABEAS CORPUS  
17 )  
18 Respondent. )  
19 )  
20 )

21 On December 16, 2009, petitioner Larry Tate, a person in state  
22 custody proceeding pro se, filed a petition for writ of habeas corpus  
23 under 28 U.S.C. § 2254, challenging his 1996 conviction and sentence  
24 in Los Angeles County Superior Court case no. YA025070.  
25  
26

27 **BACKGROUND**

28 This Court, pursuant to Federal Rule of Evidence 201, takes  
judicial notice of the records in a prior federal habeas corpus action  
brought by petitioner: Tate v. Yates, case no. CV 04-10605-DDP(RC)  
("Tate I"), which was dismissed as untimely on May 31, 2005. Although  
the petitioner filed a notice of appeal, his request for a certificate

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1 of appealability was denied by both this Court and the Ninth Circuit  
2 Court of Appeals.

### 3 DISCUSSION

4 The Antiterrorism and Effective Death Penalty Act of 1996  
5 ("AEDPA") "greatly restricts the power of federal courts to award  
6 relief to state prisoners who file second or successive habeas corpus  
7 applications." Tyler v. Cain, 533 U.S. 656, 661, 121 S. Ct. 2478,  
8 2481-82, 150 L. Ed. 2d 632 (2001). Specifically, the AEDPA provides:

9  
10 Before a second or successive application permitted by this  
11 section is filed in the district court, the applicant shall  
12 move in the appropriate court of appeals for an order  
13 authorizing the district court to consider the application.

14  
15 28 U.S.C. § 2244(b)(3)(A).

16  
17 This provision "creates a 'gatekeeping' mechanism for the  
18 consideration of second or successive applications in district court."  
19 Felker v. Turpin, 518 U.S. 651, 657, 116 S. Ct. 2333, 2339, 135  
20 L. Ed. 2d 827 (1996); Stewart v. Martinez-Villareal, 523 U.S. 637,  
21 641, 118 S. Ct. 1618, 1620, 140 L. Ed. 2d 849 (1998). "An individual  
22 seeking to file a 'second or successive' application must move in the  
23 appropriate court of appeals for an order directing the district court  
24 to consider his application," Martinez-Villareal, 523 U.S. at 641, 118  
25 S. Ct. at 1620, and the appellate court "may authorize the filing of a  
26 second or successive application only if it determines that the  
27 application makes a prima facie showing that the application satisfies  
28 the requirements of" Section 2244(b). 28 U.S.C. § 2244(b)(3)(C);

1 Morales v. Ornoski, 439 F.3d 529, 531 (9th Cir. 2006); see also Cooper  
 2 v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001) ("When the AEDPA is  
 3 in play, the district court may not, in the absence of proper  
 4 authorization from the court of appeals, consider a second or  
 5 successive habeas application.'" (quoting Libby v. Magnusson, 177  
 6 F.3d 43, 46 (1st Cir. 1999)).

7  
 8 "[D]ismissal of a section 2254 habeas petition for failure to  
 9 comply with the [AEDPA's] statute of limitations renders subsequent  
 10 petitions second or successive for purposes of the AEDPA, 28 U.S.C. §  
 11 2244(b)(1)." McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009)  
 12 (footnote omitted); see also Murray v. Greiner, 394 F.3d 78, 81 (2d  
 13 Cir. 2005) ("[The] dismissal of a § 2254 petition for failure to  
 14 comply with the one-year statute of limitations constitutes an  
 15 adjudication on the merits that renders future petitions under § 2254  
 16 challenging the same conviction 'second or successive' petitions under  
 17 § 2244(b)."). Since petitioner's initial habeas corpus petition, Tate  
 18 I, was denied as untimely, the instant petition is a successive  
 19 petition. Ibid.

20  
 21 Rule 4 of the Rules Governing Section 2254 Cases in the United  
 22 States Courts provides that "[i]f it plainly appears from the petition  
 23 and any attached exhibits that the petitioner is not entitled to  
 24 relief in the district court, the judge must dismiss the petition and  
 25 direct the clerk to notify the petitioner." 28 foll. U.S.C. § 2254,  
 26 Rule 4. Here, it plainly appears on the face of the petition that  
 27 petitioner has not received authorization from the Ninth Circuit Court  
 28 of Appeals for the instant petition to be brought. Thus, this Court

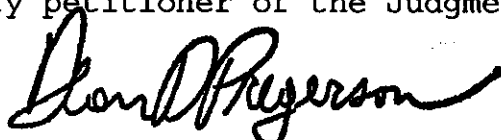
1 must dismiss the instant habeas petition as a successive petition for  
2 which it lacks subject matter jurisdiction.

3  
4 **ORDER**

5 IT IS HEREBY ORDERED that Judgment be entered SUMMARILY  
6 DISMISSING the habeas petition and action for lack of subject matter  
7 jurisdiction.

8  
9 The Clerk of Court shall notify petitioner of the Judgment.

10  
11 DATE: 1-28-10



DEAN D. PREGERSON  
UNITED STATES DISTRICT JUDGE

12 PRESENTED BY:

13  
14 DATE: Dec. 21, 2009

15   
ROSALYN M. CHAPMAN  
UNITED STATES MAGISTRATE JUDGE

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